

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

DR 2000-091850

03/19/2012

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT

E. Toledo

Deputy

ATLAS NO. 000414138500
IN RE THE MATTER OF
ALMA J PALMER

ALMA J PALMER
2508 W SWEETWATER AVE
PHOENIX AZ 85029

AND

ANNE MAUREEN MCGEE

VALARIE A MCNEICE

UNDER ADVISEMENT RULING

Before the Court is the petition for modification of child custody filed by respondent Anne Maureen McGee. The Court has considered the record in this case and the evidence presented at the evidentiary hearing on January 18, 2012.

Jurisdictional Findings

THE COURT FINDS that the parties and the minor child have resided in Arizona continuously for at least the six months preceding the filing of the petition for dissolution. This Court, therefore, has jurisdiction as Arizona is the "home state" of the minor child. See A.R.S. § 25-1031.

Best Interest Findings: A.R.S. § 25-403

The best interest of a child is the primary consideration in awarding child custody. *Hays v. Gama*, 205 Ariz. 99, 102, ¶ 18, 67 P.3d 695, 698, ¶ 18 (2003). The child's best interest is paramount in custody determinations. Section 25-403(A) enumerates specific factors for the Court to consider, among other relevant factors, in making a determination concerning a child's

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best interests. *See* A.R.S. § 25-403(A) (“The Court shall determine custody, either originally or on petition for modification, in accordance with the best interests of the child. The Court shall consider all relevant factors including [the ten factors enumerated in the subsection].”).

In making a custody determination, the Court is mindful that as a matter of public policy, absent evidence to the contrary, “it is in a child's best interest: (1) To have substantial, frequent, meaningful and continuing parenting time with both parents[; and] (2) To have both parents participate in decision-making about the child.” *See* A.R.S. § 25-103(B).

THE COURT FINDS as follows regarding the child’s best interests pursuant to A.R.S. § 25-403:

1. The wishes of the child's parent or parents as to custody.

Father would prefer sole custody. Mother wants joint custody with her as primary residential parent.

2. The wishes of the child as to the custodian.

The contents of the Child Interview Report dated October 12, 2011 are adopted as findings of the Court.

IT IS ORDERED that the Child Interview Report shall be filed under seal.

Mother and Father both testified that Cody has expressed his desire to live with Mother. Mother believes that Cody is unhappy living with his father. Father believes that Cody prefers Prescott because of his friends who live there.

3. The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.

Cody’s relationships with his parents reflect the differences between the parents as individuals. Mother is the friend and confidant, to the point that Mr. Shelley appears to do most of the parenting of Cody in Mother’s home. Father is the taskmaster. Father testified that he and Cody talk about personal issues, however, so he at least gets credit for trying.

Cody appears to respond well to Mother’s “significant other,” Mr. Shelley. He enjoys spending time with his brothers and sisters in that family. Cody’s relationship with Father’s wife, Andrean Palmer, is strained. In that family Cody seems to feel like more of an outsider.

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But these relationships, important as they are, are secondary to Cody's relationships with his parents.

4. The child's adjustment to home, school and community.

Cody was struggling in middle school, first in Mother's care and then in Father's. His grades improved in 9th grade, after he received an Individual Education Plan, and even more so in 10th grade. He is very active in school sports and church activities. Mother and Father differ in their interpretation of this, as they do with so much else involving Cody. Father sees Cody as keeping himself busy with things he enjoys. Mother believes that Cody takes refuge in school sports because he is unhappy at home.

When Cody lived with Mother he was angry, punching holes in walls and getting suspended from school for fighting. Father testified that these anger issues have diminished in Father's care. Father believes that Mother encourages "resentment of authority."

5. The mental and physical health of all individuals involved.

There was no evidence of any significant physical health issues.

There was a dependency case against Mother and her significant other Sam Shelley in 2009. The Court has reviewed the CPS records made part of the family court record at that time. They describe escalating domestic violence and serious substance abuse. Law enforcement had been called to the home seven times over a period of five or six years as a result of family fights or alcohol intoxication. The culmination was a fight that resulted in the arrests of both Mother and Mr. Shelley for aggravated assault, after which both were found to have levels of blood alcohol in excess of .20. Substance abuse treatment and anger management, parenting education and a CASA were provided by CPS.

Mother does not believe she had an issue with alcohol or substances. She does not know why Judge Fink said "Mother's household does not appear suitable for children" in June '09, which is troubling. To her credit she participated in the CPS services, and she believes they were beneficial. She denies any current problems with alcohol though she uses it occasionally. Mr. Shelley says alcohol is not "an issue like it used to be." He testified that he drinks "a couple times a week," a six pack maybe.

Father does not have any mental illness, but Judge Fink's characterization of Father as "extremely rigid" in his beliefs and his approach to parenting remains accurate.

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6. *Which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent.*

Mother has historically been flexible about parenting time. Father testified that before Cody came to live with him Mother would frequently allow Cody to decide whether to spend time with his Father.

Father has complied with court-ordered parenting time, but he has been unwilling to allow Cody to spend any more time with Mother than the court order requires. He said that in the last month he's been "more lenient about letting Cody stay an extra hour."

7. *Whether one parent, both parents, or neither parent has provided primary care of the child.*

Mother was the primary residential parent until the dependency in 2009. Father has been the primary residential parent since then.

Mother is ordered to pay \$95 per month in child support, but she has never paid it.

8. *The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.*

This is not an issue.

9. *Whether a parent has complied with chapter 3, article 5 of title 25, Arizona Revised Statutes.*

The domestic relations education provisions of A.R.S. § 25-352 have been satisfied.

10. *Whether either parent was convicted of an act of false reporting of child abuse or neglect under A.R.S. § 13-2907.02.*

Neither parent has been so convicted.

11. *In addition to the foregoing, the Court must also consider any history of domestic violence (A.R.S. § 25-403(E) and 25-403.03), any drug related offenses of either party (A.R.S. § 25-403.04) and any sexual offenses (A.R.S. § 25-403.05).*

As noted above, domestic violence between Mother and Mr. Shelley was part of what led to the dependency. Mother and Mr. Shelley attended counseling. Mother denies any domestic violence issues since then. Father is not aware of any such issues; and Cody has not reported any to Father.

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Sole or Joint Custody: A.R.S. § 25-403.01

Neither sole custody nor joint custody is presumed to be preferable under Arizona law. Parents may agree to joint custody in a written parenting plan. The court may issue an order for joint custody over the objection of one of the parents if the court makes specific written findings of why the order is in the child's best interests. In determining whether joint custody is in the child's best interests, the court shall consider the factors prescribed in section 25-403, and the additional factors set out in A.R.S. section 25-403.01.

THE COURT FINDS as follows regarding the children's best interests pursuant to A.R.S. § 25-403.01:

1. The agreement or lack of an agreement by the parents regarding joint custody.

Father would prefer sole custody but seems willing to live with joint custody. Mother wants joint custody with her as primary residential parent.

2. Whether a parent's lack of agreement is unreasonable or is influenced by an issue not related to the best interests of the child.

As the Court observed at the trial, these parents appear to come by their differences honestly. Both are asking for what they honestly believe is best for their son. It is unfortunate that their respective outlooks on life, and their resulting perspectives on Cody's best interest, are so fundamentally different.

3. The past, present and future abilities of the parents to cooperate in decision-making about the child to the extent required by the order of joint custody.

In 2009 Judge Fink wrote:

. . . the Court further finds that the parties' conflict has prevented them from effectively exercising joint legal custody in the recent past. Although the Court would like the parties to be more cooperative and supportive of [each] other, the Court received no evidence that such a change was likely to occur in the near future.

This Court reluctantly concludes that Judge Fink was right. Though both parents express a willingness to improve their communication, their actions speak louder than their words. They continue to deal with each other peremptorily. Instead of seeking each other's input they tell each other what they intend to do. Instead of speaking directly they communicate through Cody, to the point of using him to make threats. ("If you aren't on the 3 o'clock shuttle I'm going to call the police.") In short, they nurture their own conflict at Cody's expense.

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4. *Whether the joint custody arrangement is logistically possible.*

Joint custody would be logistically difficult under the best of circumstances with one parent living in Maricopa County and the other in Yavapai County. With what Mr. Shelly describes as “zero” communication joint custody is not logistically feasible.

After considering all of these factors,

THE COURT FINDS that it is in child’s best interest that Father be awarded sole legal custody of the child Cody J. McGee.

Cody has stabilized emotionally in Father’s care. He is having some success in school and in his extracurricular activities. Cody himself acknowledges that he has been making better choices since he came to live with Father. Father clearly is committed to Cody’s well-being and his eventual success as an adult.

The Court understands why Cody would prefer to live with Mother. Father seems to mistrust the world generally, and Cody in particular. Controlling Cody tightly may keep him safe in the short run, but it may not build the necessary foundation for a relationship that will endure into adulthood. The Court asks Mr. Palmer to consider whether allowing Cody some freedom now, even at the risk that he might make a few mistakes, will make it more likely that Cody will continue to look home for guidance after he is legally on his own. If Cody is succeeding in important areas like school, he will probably turn out to be worthy of parental trust in other areas too.

Mother’s focus on Cody’s happiness, while admirable, is too narrow from the Court’s point of view. The Court does not believe that Mother’s *lassiez-faire* approach to parenting would be in Cody’s best interest on a full-time basis. It was not successful before. The evidence suggests that Mr. Shelley is a capable step-parent, at least when he has his own demons in hand, but a step-parent cannot be asked to substitute for the actual parents. The Court is also concerned about Mother’s lack of insight as to why Cody was put in Father’s custody in the first place. If Mother does not think that alcohol and domestic violence were problems for her family, the family is at risk of a recurrence.

IT IS THEREFORE ORDERED awarding Father sole legal custody of the child Cody J. McGee.

Parenting Time

THE COURT FINDS that, to accommodate Cody, Mother’s parenting time should be increased modestly.

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IT IS THEREFORE ORDERED that, as a term of the overall custody orders, parenting time shall be exercised as follows:

Regular Access- Beginning April 13, 2012, Mother will have parenting time with Cody every other weekend from Friday after school until Sunday at 4 p.m. If Mother's weekend falls on a three-day weekend her parenting time will end on Monday at 4 p.m.

Summer Parenting Time- The parents will share parenting time during the school summer break as follows. Father will have parenting time the first full week of the summer break. Then Mother will have two consecutive weeks of parenting time. This pattern will repeat twice. The schedule then will revert to the regular school-year schedule, with Father having the first weekend and Mother's alternate weekends beginning the following weekend. *Exception:* If Cody needs to attend summer school in order to graduate from high school on time, Cody will live with Father for as long as necessary to attend the necessary classes. In this event the parents shall rearrange the summer parenting time schedule around summer school so as to afford Mother the maximum possible amount of summer parenting time up to six full weeks.

Transportation- The existing order is affirmed. Cody will continue to ride the shuttle between Phoenix and Prescott.

Holidays- The existing holiday schedule, ordered by Judge Fink on June 26, 2009, is affirmed. The holiday schedule takes priority over the regular time-sharing schedule described above.

Telephone Contact- Each parent shall have reasonable telephone access to the child when the child is in the care of the other parent. The child shall have access to a telephone to communicate privately with the other parent at all times. If either parent permits the child to have his own phone, that parent may not prohibit the child from reasonably using the phone to speak or exchange text messages with the other parent, provided that the other parent or the child pays any extra cost associated with the calls or messages.

THE COURT FINDS that this plan is in the best interest of the child.

Custody Terms

IT IS ORDERED establishing the following custody terms. To the extent that these terms are inconsistent with any prior custody-related orders of the Court, these terms are controlling.

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Parental Access To Records And Information- Both parents are entitled to have equal access to documents and other information concerning each child's education and physical, mental, moral and emotional health including medical, school, police, court and other records directly from the custodian of the records or from the other parent. A person who does not comply with a reasonable request shall reimburse the requesting parent for court costs and attorney fees incurred by that parent to force compliance with this subsection. A parent who attempts to restrict the release of documents or information by the custodian, without a prior court order, is subject to appropriate legal sanctions.

Educational Arrangements- Both parents have the right to participate in school conferences, events, and activities (including extra-curricular), and the right to consult with teachers and other school personnel. Both parents shall cooperate on educational matters pertaining to each child and shall keep one another reasonably informed regarding the status of each child's education.

Medical And Dental Arrangements- Both parents have the right to authorize necessary emergency medical/dental treatment and the right to consult with physicians and other medical practitioners. Both parents shall advise the other parent immediately of any emergency medical/dental care sought for each child. Both parents shall cooperate on health matters pertaining to each child and shall keep one another reasonably informed regarding the status of each child's health. Both parents shall keep each other informed as to names, addresses, and telephone numbers of all medical/dental care practitioners.

Religious Education Arrangements- Each parent may take the minor children to a church or place of worship of his or her choice during the time that the minor children is/are in his or her care.

Parental Communication (General)- Each parent will promptly inform the other parent of any emergency or other important event that involves a minor child. In furtherance of each child's best interests the parents shall confer and shall consider each other's views. The parents shall communicate to address day-to-day and more significant issues. All communications regarding a minor child shall be between the parents. A parent may not delegate the task of communication to any other person including a step-parent. *A parent shall not use a child to convey information or to set up parenting time changes, under any circumstances.*

Parental Communication (Extra Activities)- Each parent will consult and agree with the other parent regarding any extra activity that affects the other parent's parenting time.

Parental Communication (Use of E-mail)- The parents shall use e-mail as their primary method for communication. This method allows the parents to develop their communication and ensures both accountability and verifiability. Both parties shall maintain and regularly review

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their e-mail accounts. They shall each respond in a timely fashion, even if such response is merely to acknowledge the receipt of information. Each should print copies of all e-mails received and sent so that if an issue arises in the future that has been addressed through e-mail, each party shall have proof as to what was communicated.

Protection From Conflict- Each parent shall encourage love and respect between the minor children and the other parent, and neither parent shall do anything that may hurt the other parent's relationship with the minor children. Neither parent may discuss any aspect of litigation with a child or in the child's presence, or involve a child in any way in conflicts between the parents, except by assuring the child that the parents are trying to work out appropriate arrangements so that the child can have frequent and regular access to both parents.

Support of Parenting Plan- Both parents shall communicate to the child that they are mutually committed to the court-ordered parenting plan. Both parents are prohibited from asking or encouraging the child to request parenting plan changes that would increase that parent's parenting time or that would otherwise favor that parent.

Sex Offender Notification- Arizona law requires a child's parent or custodian to must notify the other parent or custodian immediately if the parent or custodian knows that a convicted or registered sex offender or a person who has been convicted of a dangerous crime against children may have access to the child. The parent or custodian must provide notice by first class mail, return receipt requested or by electronic means to an electronic mail address that the recipient provided to the parent or custodian for notification purposes.

Relocation- Neither parent may relocate with the child outside of the Phoenix metropolitan area unless that parent first secures the written consent of the other or secures a court order authorizing the move, except as expressly permitted under A.R.S. section 25-408.

Mediation Or Conciliation Services- The parties shall participate in mediation through a private mediator or through this Court's Conciliation Services to resolve any disputes, problems or proposed changes regarding child custody, parenting time or any provision of this custody order, before seeking further relief from the Court. While a dispute is being resolved, neither parent shall deviate from this Parenting Plan, or act in such a way that is inconsistent with the terms of this agreement.

Periodic Review- The parties shall review and update the terms of the custody and parenting time plan with each other or with the assistance of a private counselor or Conciliation Services mediator, upon written request, at least every four years or whenever a substantial change in circumstances makes changes in the plan necessary.

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Notify Other Parent of Address Change- Each parent shall inform the other parent of any change of address and/or phone number in advance if possible, and in any event within ten days after the change.

Additional Issues

IT IS ORDERED denying Respondent's motion to hold Petitioner in contempt for failing to obtain counseling for Cody in 2009. The order for counseling was issued in the context of a temporary order that was vacated by operation of law when the underlying petition was dismissed in December 2009. In addition, the counseling order required the parties to cooperate. The failure of these parties to cooperate has been mutual for many years.

IT IS FURTHER ORDERED that Respondent's request for an award of attorney's fees is denied.

IT IS FURTHER ORDERED affirming the existing child support order. This Order does not modify parenting time significantly enough to cause a substantial change in child support. Neither party has sought recalculation of child support based on other factors such as changes in income. If any party believes that recalculation of child support is necessary, that party may file a petition for a hearing before the IV-D Commissioner.

IT IS FURTHER ORDERED denying any affirmative relief sought before the date of this Order that is not expressly granted above.

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81(D), Arizona Rules of Family Law Procedure.

/s/: JOHN HANNAH

THE HONORABLE JOHN R. HANNAH
JUDICIAL OFFICER OF THE SUPERIOR COURT

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.